



State of Ohio Environmental Protection Agency

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January 2, 2001

Susan E. Ashbrook
Assistant City Attorney
Civil Division
90 W. Broad Street
Columbus, Ohio 43215-9013

Re: Draft Blacklick Creek Urban Waste Treatment Management Plan

Dear Susan:

Ohio EPA is looking forward to the opportunity to discuss with the City of Columbus the draft Blacklick Creek Urban Waste Treatment Management Plan ("Blacklick 208 plan") and the Columbus Metropolitan Facilities Plan Update ("Columbus 201 plan"). We are prepared to discuss in detail the intent and language of the Blacklick 208 plan as well as suggested modifications to the draft plan. We are optimistic that we will be able to have productive discussions on both plans.

As you know, on December 11, 2001, the Blacklick 208 plan was issued as a draft document for public comment for 45 days. You are also aware that Ohio EPA is under a federal court order to prepare and certify to U.S. EPA the Blacklick 208 plan by December 29, 2001. Although the Agency did not meet the deadline, we are hopeful that we can continue to move the plan development process forward in order to submit a final plan to U.S. EPA in the next two months. With the understanding that we are under a tight time frame, we are committed to devoting as much time as necessary in the next several weeks to discuss the draft plan with the City and any other interested stakeholders. We have scheduled a general meeting for the stakeholders for January 15, 2002. As with any other stakeholder, we will agree to meet independently upon request. We recognize that the City is a unique stakeholder in this process as having developed the Columbus 201 plan, and therefore, our expectation is that we will be meeting independently in the coming weeks.

You and I discussed the format of the discussions between the City and Ohio EPA. We agreed that an exchange of written positions on the major issue of the proper role of Ohio EPA and the City in the 201/208 plan development processes would be a productive way to initiate our discussions. After the exchange of written positions, we agreed to meet after the first of the year on a continuing basis to discuss in depth all other issues associated with the Blacklick 208 plan and Columbus 201 plan.

Bob Taft, Governor
Maureen O'Connor, Lieutenant Governor
Christopher Jones, Director

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You also requested as part of our written position that we include a discussion of what Ohio EPA expected from Columbus in the Columbus 201 plan, and how Ohio EPA's current view is consistent with the advice given to the City in the year preceding the Columbus 201 plan submittal. I do not believe it would be a productive use of our very limited time to rehash the various meetings and written exchanges that occurred in the past couple of years. We will acknowledge that there has been poor communication in the past between the City and the Agency. We will also acknowledge that Ohio EPA could have done a better job communicating its expectations to the City before it invested substantial time and energy into developing the Columbus 201 plan. However, rather than belabor where communications broke down, we should acknowledge where we are today and focus on how we can foster better communication going forward. To that end, Ohio EPA is committed to devoting as many resources as necessary toward the goal of having a productive dialogue on the Blacklick 208 plan and Columbus 201 plan with the City.

You have requested an explanation of Ohio EPA's view of the roles of the City of Columbus and Ohio EPA in the 208 plan development process. As background to that explanation, it may be helpful to review our understanding of four essential terms used in the plan development process: areawide planning agency ("Areawide"), designated management agency ("DMA"), areawide waste treatment management plan ("208 plan"), and facilities plan ("201 plan").

Under Section 208(a), an areawide planning agency ("Areawide") is a representative organization, including elected officials from local governments or their designees, capable of developing an effective areawide waste treatment management plan ("208 plan") for an area of the state which, as a result of urban-industrial concentrations or other factors, has substantial water quality control problems. Section 208(a)(2) outlines the process for the Governor of each state to create an Areawide for identified geographic areas of the state. In Ohio, the Governor has designated six Areawides, generally near major metropolitan areas in the state. Each of the six Areawides provides planning for between two and six counties. No Areawide has ever been designated for central Ohio. Section 208(a) provides that the State will act as the planning agency for all portions of the state that are not within the boundaries of an areawide. Therefore, under the Clean Water Act, Ohio EPA is to act as the Areawide for central Ohio.

One responsibility of the Areawide is to develop a 208 plan for its planning area. The 208 plan shall include, but not be limited to, the elements identified in Section 208(b)(2)(A) through (K). In part, these elements entail identification of treatment works necessary to meet waste treatment needs over a twenty year period, establishment of construction priorities, and identification of measures necessary to carry out the plan. Once developed, the 208 plan is to be certified by the Governor and submitted to U.S. EPA for approval.

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By comparison, a regional operating agency, or designated management agency ("DMA"), is responsible for carrying out appropriate portions of a 208 plan. These management agencies are designated by the Governor, in consultation with the Areawide, at the time a 208 plan is submitted to the US EPA Administrator; thus the name designated management agency or DMA. A DMA must have adequate authority to do all of the things listed in Section 208(c)(2)(A) through (I) of the Clean Water Act. In essence, a DMA must have the legal authority, managerial capacity and financial resources to carry out responsibilities assigned in the 208 plan. Therefore, the 208 plan, as certified by the Governor, establishes the DMAs, or regional operating agencies, and their specific and unique responsibilities to carry out roles described in the 208 plan.

Finally, a facilities plan ("201 plan") is typically prepared by a wastewater treatment provider. The Tenth District Court of Appeals summarized the purpose of a 201 plan as follows:

A Section 201 plan is an analysis of alternatives designed to address water quality problems in a given area which is prepared by an applicant in the Federal Construction Grant program for a grant of federal funds in order to finance the construction of a publicly owned treatment facility. . . . [s]uch a plan only advances the narrow interests of a single community within a given area, unlike a Section 208 plan which balances the interests of all residents and communities within an entire geographical planning area so as to foster proper management and protection of water resources. [citation omitted]

Columbus and Franklin County Metropolitan Park District v. Shank (June 27, 1991), Franklin App. Nos. 90AP-516 through 520, unreported, 1991 Ohio App. LEXIS 3105, *37-38.

The Clean Water Act clearly distinguishes between a 208 plan prepared by an Areawide or the State and a 201 plan prepared by a public entity for its treatment facilities. A 208 plan addresses the control of water pollution from all point and non-point sources in the geographic area. A 201 plan addresses a particular facility or facilities. The area addressed in a facility plan is a discrete geographical planning area of sufficient scope to allow for an analysis of various alternatives for the treatment and disposal of wastewater.

The Areawides in Ohio, such as NEFCO, NOACA and TMACOG, are made up of the elected officials or their designees from counties, municipalities and townships within the designated geographic area. The boundaries of each of the six Areawides traces the county borders that make up the planning area. Therefore, the requirements and authority of the Areawide are limited to within the political jurisdictions represented by the Areawide. For example, neither NOACA's nor NEFCO's planning areas include Ashland County, although both areas border the

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County. As a result, neither Areawide has the ability to independently include any areas within Ashland County within its planning authority. This limitation on the planning authority of each Areawide is necessary in order to achieve the goal acknowledged by the Tenth District Court of Appeals that the 208 planning process should "balance the interests of all residents and communities within an entire geographical planning area so as to foster proper management and protection of water resources."

Each Areawide maintains the primary responsibility for planning and dispute resolution within its designated boundary. Under the 208 plans adopted by each Areawide in Ohio, multiple DMAs are designated to fulfill various wastewater collection and treatment needs within the planning area. This includes, under the 208 plan, designation of those areas that will be served by the various wastewater treatment providers within the planning area. It may also include designation of various DMAs to address wastewater collection and treatment needs by alternative systems (on-lot systems, off-lot systems, package plants, and spray irrigation systems) for specified boundaries within the planning area. Finally, the 208 plan may also include specified mechanisms for dispute resolution when conflicts arise between DMAs and service providers within the planning area.

The City of Columbus has a large facilities planning area specified in the Columbus 201 plan. Its planning area includes all of Franklin County as well as portions of Delaware, Madison, Fairfield, and Pickaway Counties. As a result, its facilities planning area extends well beyond the City's political boundaries and beyond those areas it presently provides collection or treatment. This is not new, the City's previous planning area was as extensive. What is new is the authority the City is requesting through the Columbus 201 plan to have within that planning area.

It is our understanding that the Columbus 201 plan proposes that the City determine the boundaries of the various service providers within its planning area. In the Columbus 201 plan, the City has drawn present and future service areas for each of the providers within the facilities planning area. Each of the providers may, at some point in the future, elect to connect to the City, or another provider, if acceptable agreements are negotiated. It is also our understanding that the City is proposing that it make all final decisions as to provision of treatment and collection for the unincorporated areas of Franklin County and portions of the surrounding counties. Finally, it is our understanding that the City is proposing to be the final arbiter of all disputes regarding provision of wastewater treatment that may arise between counties, municipalities, township and service providers within its facilities planning area. We ask for clarification if we misunderstood the intent of the Columbus 201 plan.

If this is the intent of the Columbus 201 plan, the City is requesting, what in Ohio EPA's view

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would be Areawide status for the Central Ohio area. As outlined above, the responsibility and authority requested by the City is the same that is possessed by the six other Areawides that have been designated by the Governor in Ohio. Ohio EPA believes that provision of that type of authority to a political entity that does not represent the interests of all residents and communities within an entire geographical planning area would not be good public policy and would be contrary to Section 208.

Such a designation through certification of the Columbus 201 plan as the 208 Areawide Waste Treatment Management Plan, would not meet the intent of the Clean Water Act. Columbus and the other local officials in central Ohio have not applied for designation as an Areawide in accordance with the requirements mandated in Section 208(a), which contemplates that an Areawide will include elected officials or their designees for the geographic area that makes up the planning area. Such a designation would also be contrary to the history of Areawide designations in Ohio. With respect to the six other Areawides designated by the Governor, the planning and dispute resolution authority was limited to the political jurisdictions that made up the Areawide. Finally, Ohio EPA believes that such an approach would not be good public policy because you would be stripping the authority and ability of the counties and townships (as well as their electorate) from making or contributing to growth decisions within their area. This would be contrary to Section 208(a)(2) that requires an Areawide to be a representative organization.

Based on statements made by representatives of the City, Columbus may believe that it already had the authority described above. Despite requesting broad new planning authority, the Columbus 201 plan states that it "does not change the existing roles of local governments with regard to land use planning." Columbus Metropolitan Facility Plan Update, pg. 47. Furthermore, City representatives have stated that the 1976 facilities plan, which was recertified in 1993, established the facilities planning area and gave the City the authority to control all wastewater determinations within that geographic area.

This view of the legal effect of the prior Columbus 201 facilities planning area was rejected by the Environmental Review Appeal Commission (ERAC) and that decision was later upheld by the Tenth District Court of Appeals and in *Columbus and Franklin County Metropolitan Park District v. Shank*. With regard to the legal effect of the Columbus 201 planning area, ERAC stated as follows:

While the Columbus Facilities Plan, the 208 Plan and the subsequent U.S. EPA Impact Statement do provide that the geographical areas in question here are part of the overall planning area, neither these documents nor any other evidence in the record demonstrates that these areas are part of the City of Columbus service area. A planning area is merely that geographical area that may, at some time, beyond the prescribed planning period be

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served by the central treatment facilities.

Columbus and Franklin County Metropolitan Park District v. Shank (April 5, 1990), Case Nos. EBR 251901-251906, 251908, and 251909, unreported, 1990 Ohio ENV LEXIS 5, *26-27.

City representatives have also cited to the 1988 Supplemental Environmental Impact Statement for the Wastewater Treatment Facilities for the Columbus, Ohio Metropolitan Area (SEIS) to suggest that US EPA reviewed the facilities planning area and endorsed the concept that all wastewater generated within the geographic area encompassed by the planning area should be treated at the two City of Columbus wastewater treatment plants. However, a review of that document indicates that the SEIS was an evaluation of a proposal by the City of Columbus to shut down one of the two wastewater treatment plants that are currently in operation. US EPA rejected that proposal largely on the basis that the flows from a single plant would create a greater negative environmental impact than continuing to operate two plants. Other than an analysis of the one plant versus two plant alternative, nothing in the SEIS document evaluates various wastewater treatment alternatives within the facilities planning area.

While Ohio EPA views the Columbus 201 plan as seeking a major shift in planning authority, we believe that the draft Blacklick 208 plan maintains the existing roles of local governments with regard to land use planning. The Blacklick 208 plan also requires additional consideration by local governments of environmental impacts that result from development. Under the draft Blacklick 208 plan, the DMAs, which includes Columbus, are responsible for providing wastewater collection and/or treatment for areas within their jurisdiction and any other areas for which they are currently under contract to provide services. If a DMA wishes to serve an additional area, it must prepare a plan which addresses the facilities plan elements set forth in the draft Blacklick 208 plan. The goal is to minimize the impacts on water quality when central sewer service is provided to an area. Ohio EPA believes that this approach is consistent with the intent of the Clean Water Act.

City representatives have voiced strong concern that the draft Blacklick 208 plan does not maintain the existing roles of local governments with regard to land use planning. Representatives have also voiced strong concern regarding the position taken within the draft Blacklick 208 plan on alternative wastewater systems. Ohio EPA is sensitive to these concerns and believes that we can have a productive dialogue on these issues. The Blacklick 208 plan is a draft document and Ohio EPA remains willing to make appropriate modifications to the plan based on comments received from interested stakeholders.


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Again, we look forward to meeting with the City to discuss the Columbus 201 plan and draft Blacklick 208 plan.

Sincerely,



Joseph P. Koncelik
Assistant Director

cc: Lisa Morris, Chief, DSW
Greg Smith, Legal
Dan Dudley, DSW